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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: Universal Yacht Services, Inc.

File: B-287071; B-287071.2

Date: April 4, 2001

Edward J. Tolchin, Esq., Fettmann, Tolchin & Majors, for the protester.
Anthony Savas, Petchem, Inc., an intervenor.
Robert M. Elwell, Esq., and George N. Brezna, Esq., Department of the Navy, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Proposal that failed to conform to a material solicitation requirement was technically unacceptable and could not form the basis for award.

DECISION

Universal Yacht Services, Inc. (UYS) protests the award of a contract to Petchem, Inc. under request for proposals (RFP) No. N00033-00-R-1033, issued by the Department of the Navy, Military Sealift Command, for a personnel transfer vessel (PTV) which will be used to conduct open ocean transfers of passengers and cargo between sea-borne submarines and the shore in the area of Port Canaveral, Florida. UYS contends that the agency improperly waived a material solicitation requirement for Petchem and improperly accepted Petchem's nonconforming proposal for award.

We sustain the protest.

The RFP, issued as a total small business set-aside on September 22, 2000, contemplated the award of a fixed-price time charter contract for a base period and three 1-year option periods.¹ RFP Cover Sheet; RFP at 2-4, 26. The RFP's statement of work contained a 2-page list of required minimum vessel characteristics. As

¹ A time charter is a maritime contract giving the charterer--here, the agency--exclusive use of a named vessel for a designated period of time. Contracting Officer's (CO) Statement at 1 n.2.

relevant here, the RFP listed a transit speed requirement of “9 knots in moderate weather @ 80% rated horsepower.” RFP at 6. The agency explains that this phrase means that a vessel must be capable of making a speed of 9 knots (nautical miles per hour) at 80 percent of its engine’s total maximum rated horsepower in moderate weather conditions, that is, in winds of 11 to 16 knots and seas of 3 to 5 feet. The agency states that the requirement for 9 knots reflects its need for a reasonable transit time between shore facilities and submarines. The agency further states that its requirement that 9 knots be attained under moderate weather conditions at 80 percent rated horsepower will ensure that adequate (in this case, 20 percent) emergency reserve power exists.² Memorandum from CO to GAO (Mar. 8, 2001).

The RFP stated that the award would be made to the responsible offeror whose proposal was determined to be most advantageous to the government, considering price, technical characteristics of the proposed vessel, and an offeror’s past performance. RFP at 32.

Eight firms, including UYS, a recently incorporated firm, and Petchem, the incumbent contractor, submitted proposals by the closing time on October 20. UYS proposed a vessel (the “Ocean Discovery”) which had been out of service since 1996. Petchem proposed the same vessel (the “Christine S”) which it used to perform the PTV requirements under the predecessor contract. With respect to the RFP’s transit speed requirement, UYS inserted on its vessel characteristic sheet³ that its vessel’s speed was “>15Kts in moderate weather @ 80% rated horsepower.” Agency Report (AR), Tab 5, UYS Initial Proposal, attach. 3-2. Petchem inserted on its vessel characteristic sheet that its vessel’s speed was “9 kts. in mod. weather @ 80%.”⁴ AR, Tab 6, Petchem Initial Proposal, attach. 3-2.

² The agency explains that “9 knots in moderate weather” without reference to “@ 80% rated horsepower” means that a vessel could be using either more or less than 80 percent of its rated horsepower to meet the RFP’s transit speed requirement. Memorandum from CO to GAO (Mar. 8, 2001). For example, and as relevant here, without any reference to a percentage rated horsepower, in order to attain a speed of 9 knots in moderate weather, a vessel could be using 90 percent of its rated horsepower capacity, thereby leaving only a 10-percent reserve for emergencies, as opposed to a 20-percent reserve as required by the RFP. This scenario clearly would not be in compliance with the RFP’s minimum transit speed requirement.

³ The RFP contained as an attachment a blank “Vessel Characteristic Sheet” on which an offeror was required to insert the particular characteristics for the vessel being proposed. RFP Attach. 3-2.

⁴ The “@ 80%” was added in a handwritten notation by Petchem to its vessel characteristic sheet that otherwise basically was completed in type. AR, Tab 6, Petchem Initial Proposal, attach. 3-2.

The proposals of three firms, including UYS and Petchem, were included in the competitive range. AR, Tab 11, Pre-Negotiation Business Clearance Memorandum, at 10. Following two rounds of discussions with each of the competitive range offerors, the offerors submitted final proposal revisions. As relevant here, in its final proposal revision, UYS remained committed to the transit speed proposed in its initial proposal, as referenced above. In its final proposal revision, Petchem committed to “9 kts. in mod. weather” without any reference to “@ 80% rated horsepower.” AR, Tab 16, Petchem’s Revised Proposal, attach. 3-2.

The contracting officer, who served as the source selection authority, determined that the proposals of UYS and Petchem were both technically acceptable, but that Petchem’s proposal provided the best technical solution, followed by the proposal of UYS. More specifically, the contracting officer noted that Petchem proposed a proven vessel which was currently performing the agency’s PTV requirements (including the same minimum transit speed requirement as included in this RFP). The contracting officer acknowledged that UYS proposed a vessel that was warranted to meet all of the RFP requirements, specifically recognizing that this vessel “does provide for higher transit speeds.” However, the contracting officer was concerned that since the vessel proposed by UYS had not been operated since 1996, there was a high risk that this vessel would encounter problems until it was properly broken in and would require major modifications to satisfy two critical RFP requirements involving the installation of subsurface fendering and a brow. AR, Tab 22, Source Selection Decision, at 2; AR, Tab 25, Post-Negotiation Business Clearance Memorandum, at 5.

With respect to past performance, the contracting officer noted that Petchem had corporate experience and past performance directly relevant to the type of mission encompassed by the current PTV requirements. The contracting officer noted that Petchem had not missed a mission during its performance as the incumbent contractor and that the firm had not encountered even minor performance deficiencies. The contracting officer rated Petchem’s past performance as excellent. In contrast, the contracting officer commented that UYS was a relatively new company with no corporate experience and past performance. While UYS proposed experienced personnel, the contracting officer did not view the experience and past performance of these personnel as comparable to corporate experience and past performance since, as a new company, there was no information available about how the individuals proposed by UYS would perform collectively as a team. Accordingly, the contracting officer assigned a neutral rating to UYS for past performance.⁵ AR, Tab 22, Source Selection Decision, at 3; AR, Tab 25, Post-Negotiation Business Clearance Memorandum, at 6.

⁵ Contrary to the protester’s position, we believe that this neutral rating was reasonable.

Based on Petchem's overall higher ranking on non-price evaluation factors, the contracting officer concluded that Petchem's proposal, which was priced approximately [deleted] percent higher than the UYS proposal, represented the best value to the government. AR, Tab 22, Source Selection Decision, at 4-5. On January 3, 2001, the contracting officer executed Petchem's contract. Of relevance here, the transit speed as listed in Petchem's contract was "9 knots in moderate weather." AR, Tab 29, Petchem Contract, at 6.

UYS argues that in awarding the contract to Petchem, the agency improperly waived the RFP's minimum transit speed requirement (i.e., "9 knots in moderate weather @ 80% rated horsepower").⁶ UYS points out that while Petchem agreed in its initial proposal to meet this requirement, Petchem committed in its final proposal revision only to a 9-knot transit speed in moderate weather, but omitted any reference to the RFP's "@ 80% rated horsepower" requirement. In addition, UYS points out that the "@ 80% rated horsepower" requirement was omitted from Petchem's contract. Protester's Comments at 4.

The agency maintains that there was no difference between Petchem's initial proposal and its final proposal revision in terms of the firm's commitment to satisfy the RFP's transit speed requirement, especially since under the predecessor contract, Petchem's vessel was required to satisfy the same transit speed requirement. Memorandum from CO to GAO (Mar. 8, 2001). The agency notes that the reference to "@ 80%" in Petchem's initial proposal had been inserted by hand to the vessel characteristic sheet completed by Petchem for the "Christine S"; the agency viewed the failure of Petchem to add that handwritten notation to the same sheet in its final proposal revision and the failure of the agency to include "@ 80% rated horsepower" in Petchem's contract as clerical errors.

It is well-settled that, in a negotiated procurement, a proposal that fails to conform to one or more of the solicitation's material requirements is technically unacceptable and cannot form the basis for an award. Farmland Nat'l Beef, B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD ¶ 31 at 8.

Here, there is no dispute that the RFP's minimum transit speed requirement, as quoted above, was material. Although Petchem stated in its initial proposal that its proposed vessel would meet this material requirement, in its final proposal revision, Petchem did not state that its proposed vessel would transit at 9 knots in moderate

⁶ In its initial protest, UYS included a declaration from the former captain of the "Christine S," who stated that he was personally familiar with the operating characteristics of that ship. Based on his 5 years of work on the "Christine S," this individual stated that this vessel could not maintain the transit speed required by the RFP.

weather “@ 80% rated horsepower.” Since Petchem’s final proposal revision did not satisfy the RFP’s minimum transit speed requirement, the agency’s acceptance of the firm’s proposal meant that the agency waived this requirement for Petchem. The award to Petchem on the basis of its nonconforming proposal was improper.⁷

Further, in our view, UYS was prejudiced by the award to Petchem. In this respect, UYS committed not only to meet, but to exceed, the RFP’s minimum transit speed requirement. In fact, the higher transit speed proposed by UYS was considered a strength of the UYS technically acceptable, low-priced proposal. AR, Tab 24, Excerpt from Protester’s Debriefing. On this record, it is clear that, but for the agency’s improper award on the basis of Petchem’s nonconforming proposal, UYS would have had a substantial chance of receiving an award. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

While UYS seeks the award, we do not believe that this is an appropriate remedy. In this respect, the agency has expressed some concern with the lack of detail provided by UYS in its proposal regarding how and where UYS proposes to make necessary vessel modifications, for example, installation of subsurface fendering and a brow, and the timeframe for completing such modifications. Accordingly, in order to address these concerns with the UYS proposal, as well as the issue of the transit speed proposed by Petchem, we recommend that the agency reopen discussions, request another final proposal revision from each firm for evaluation, make a new source selection decision, and terminate the existing contract if an offeror other than Petchem is selected. We also recommend that UYS be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2000). The UYS certified claim for such costs, detailing the time expended and the costs incurred, must be submitted to the agency within 60 days of receiving this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁷ On February 21, 2001, during the pendency of this protest, the agency modified Petchem’s contract so that the contract would conform to the RFP’s minimum transit speed requirement. Specifically, the agency replaced the “9 knots in moderate weather” contract language with “9 knots in moderate weather, at 80% rated [h]orsepower.” Contract amend. 1, Feb. 21, 2001. However, the fact that the awardee may, after award, agree to be bound to the solicitation’s material requirements does not render the proposal acceptable or the award proper. Tri-State Gov’t Servs., Inc., B-277315.2, Oct. 15, 1997, 97-2 CPD ¶ 143 at 4.